(1D)

No. 97-1008

In The

Supreme Court of the United States

October Term, 1998

CAROLYN C. CLEVELAND,

Petitioner,

vs.

POLICY MANAGEMENT SYSTEMS CORPORATION; GENERAL INFORMATION SERVICES, a Division of Policy Management Systems Corporation; and CYBERTEK CORP.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq.

2. If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts she is a "qualified individual with a disability" under the ADA?

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BRIEF OF RESPONDENTS

Respondent, Policy Management Systems Corporation,[1] requests that the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, affirming the district court's grant of summary judgment for Respondent, be affirmed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 120 F.3d 513 (5th Cir. 1997), and printed at Appendix A to the Petition for Writ of Certiorari, affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of Respondent. The district court's September 6, 1996 judgment is printed at Appendix B to the Petition for Writ of Certiorari. The Fifth Circuit's September 15, 1997 Order denying Petitioner's Petition for Rehearing is printed at Appendix C to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Fifth Circuit was entered on August 14, 1997. Petitioner filed a petition for rehearing which was denied on September 15, 1997. The Petition for

[1] Petitioner also sued General Information Services ("GIS") and Cybertek. GIS was never a separate entity from PMSC and Petitioner never worked for Cybertek. (R.I 5) Therefore, Policy Managment Systems Corporation ("PMSC") or "Respondent" will be used herein to refer to Petitioner's former employer.

Writ of Certiorari was filed on December 15, 1997. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Carolyn Cleveland ("Cleveland") brought this action against her former employer, Policy Management Systems Corporation ("PMSC"), claiming that she was terminated in violation of the Americans With Disabilities Act ("ADA").[2]

Cleveland was hired by PMSC on August 30, 1993, to perform telephonic background checks on prospective employees of PMSC's clients. Specifically, PMSC's clients forwarded employment applications to PMSC telephone operators like Cleveland. PMSC telephone operators performed the background check on the applicant and provided a report to the client. (R.I 86-87).[3]

On January 7, 1994, Cleveland had a stroke and took a leave of absence from PMSC.[4] (R.I 88). On January 21, 1994, Cleveland filed for Social Security disability benefits and specifically represented to the Social Security

[2] Cleveland also claimed PMSC retaliated against her for filing a workers' compensation claim. The retaliation claim was severed after the Motion for Summary Judgment was granted and is currently pending in Texas state court.

[3] R.I and R.II refer to volumes one and two of the Record.

[4] Cleveland states she suffered a stroke "during the course and scope of her employment." (Petitioner's Brief p. 5). While Cleveland may have had a stroke while working, there is no evidence her stroke was caused by her work.

Administration ("SSA") that she had a disabling condition dating from January 7, 1994. (J.A. 13-20). She was ultimately awarded benefits retroactive to January 7, 1994.

A. Cleveland swears she became disabled and unable to work on January 7, 1994.

On January 26, 1994, Cleveland signed a formal application for Social Security disability benefits and specifically stated the following:

> I became unable to work because of my disabling condition on January 7, 1994.
>
> I am still disabled.
>
> I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime. . . . I affirm that all information I have given in connection with this claim is true.

(J.A. 20-24).[5]

B. Cleveland returns to work and continues to pursue Social Security disability benefits.

On April 11, 1994, Cleveland returned to her job and PMSC allowed her to work half days. (J.A. 95). On April 25, 1994, she returned to full duty. (J.A. 95). Meanwhile,

[5] J.A. refers to the Joint Appendix filed by the parties.

the SSA forwarded Cleveland's claim to the Texas Rehabilitation Commission ("TRC"), which requested additional information from Cleveland on April 20, 1994. (J.A. 37-38). After the TRC attempted to contact Cleveland to obtain information about her claim, she informed the TRC that she had returned to work in April. (J.A. 38). The SSA's file does not contain any requests from Cleveland withdrawing her claim for benefits or asserting that she no longer had a disability. (R.II 56-386).

Despite PMSC's numerous attempts to help Cleveland and to train her, she could not perform her job. (J.A. 40-42). PMSC even extended Cleveland's training period in the hope she could perform her duties. (J.A. 40-41). Despite PMSC's efforts, Cleveland recognized and told the SSA she "attempted to return to work . . . [but she] could no longer do [her] job because of [her] condition." (J.A. 47). On July 15, 1994, PMSC terminated Cleveland for poor job performance.[6] (R.I 91).

[6] PMSC denies that Cleveland requested accommodation or that a reasonable accommodation was possible. PMSC did not present evidence on the fact intensive issue of reasonable accommodation because its Motion for Summary Judgment was based on Cleveland's continuous assertions to the SSA of her inability to work which precluded her from claiming to be a "qualified individual" under the ADA. Petitioner's factual allegations were alleged in an affidavit in response to PMSC's Motion for Summary Judgment. Respondent timely filed Objections and Motion to Strike Petitioner's evidence which was never ruled on by the court. (R.I 139-44).

C. Cleveland swears that she *continues to be disabled.*

On July 11, 1994, the SSA denied Cleveland's request for benefits. (J.A. 38-39). On September 14, 1994, Cleveland filed a Request for Reconsideration stating: "I disagree with the determination made on my disability. . . . I continue to be disabled." (J.A. 46). Cleveland's statement that she "continue[d]" to be disabled is consistent with her representations that she was disabled beginning January 7, 1994, not just after her termination. Moreover, Cleveland ultimately received benefits from that date.

D. A critical admission – in her own handwriting, and under penalty of perjury, Cleveland declares: "I could no longer do the job because of my condition."

On September 20, 1994, Cleveland filed a form with the SSA stating she "worked 3 months or less and stopped because of [her] injury or illness." (J.A. 47).

Significantly, she also stated in her own handwriting that she was terminated "because [she] could no longer do the job because of [her] condition." (J.A. 47).

E. Cleveland's treating doctor classifies her as 100% disabled.

In September 1994, Cleveland's neurologist, Dr. Steven Herzog, stated that Cleveland "suffered . . . a stroke on 1/7/94 causing aphasia. This has produced complete disability. . . . " (J.A. 45). Dr. Herzog classified

Cleveland as "100% disabled."[7] (J.A. 45). Dr. Herzog's records were provided to the SSA by Cleveland as part of her pursuit of benefits. (J.A. 43-46).

F. Cleveland again admits she went back to work but could not work.

On November 11, 1994, Cleveland stated to Cary Conaway, Ph.D. of the TRC, that she was at the examination "[t]o get [her] disability. . . . " (J.A. 57). When asked why she had applied for disability benefits, Cleveland responded, "I had a stroke in January 1994; I went back to work but I couldn't work." (J.A. 57). On November 30, 1994, the SSA denied Cleveland's request for benefits. (J.A. 62-64).

G. Cleveland diligently pursues her benefits and again represents that she cannot do her job because of her disability.

On January 9, 1995, Cleveland signed a further Request for Reconsideration to the SSA, stating: "[she was] unable to work due to [her] disability." (J.A. 73-74).

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[7] Petitioner contends Dr. Herzog expected her to recover completely. (Petitioner's Brief p. 7.) None of the information Dr. Herzog produced to the SSA indicates Cleveland was expected to fully recover. (R.II 56-386). Dr. Herzog did send a letter to the Equal Employment Opportunity Commission, but it was never provided to the SSA. (R.II 56-386). The Joint Appendix incorrectly indicates that Dr. Herzog's letter to the Equal Employment Opportunity Commission was a part of the SSA file.

On May 9, 1995, Cleveland requested a hearing before an Administrative Law Judge, representing "[she was] unable to work due to [her] disability." (J.A. 79).

H. Another doctor confirms Cleveland's admission of total incapacity.

On May 12, 1995, Cleveland's treating physician, Dr. Bob L. Gant, stated, **"I believe this patient is permanently and completely disabled from any productive work."** (J.A. 71-72). These records were provided to the SSA as part of Cleveland's pursuit of benefits. (R.II 75).

I. Based on the representations of Cleveland and her doctors, Cleveland is found to have been completely disabled from any productive work beginning January 7, 1994.

On September 29, 1995, the Administrative Law Judge, Harold G. Adams, concluded Cleveland **"became disabled on January 7, 1994 and continues to be disabled through the date of this decision."** (J.A. 83). He further ordered that she was **"entitled to a period of disability commencing January 7, 1994. . . . "** (J.A. 84).[8]

In making his determination, Judge Adams relied in part on a medical source statement where the doctor found Cleveland's condition existed and persisted since at least January 1994, six months before any adverse employment action. (J.A. 82).

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[8] Cleveland received benefits under Title II of the Social Security Act. *See* 42 U.S.C. § 401.

J. Cleveland changes her story in an effort to avoid the unequivocal representations she made to the SSA.

All of Cleveland's representations to the SSA state she was disabled and that, despite her brief attempt, she could not work. (J.A. 20-24, 47, 57). Cleveland now implies that it was only after, and as a result of her termination, that she actively pursued and received Social Security disability benefits. (Petitioner's Brief pp. 11-14). The record, however, shows Cleveland consistently stated her disability began on the date of her stroke, January 7, 1994. (J.A. 20-24, 47, 57). She contended only after this suit was filed that her disability began or worsened after her termination from PMSC. (J.A. 20-24, 47, 57).[9]

Procedural Background of Cleveland's ADA Claim

On September 22, 1995, Cleveland filed suit claiming, inter alia, violations of the ADA (See Footnote 2). PMSC filed a motion for summary judgment on the ADA claim based on Cleveland's representations to the SSA. PMSC's position was that Cleveland could not establish a prima facie case under the ADA because she could not show she was a "qualified individual with a disability." Such an individual is one who can perform the essential functions of her job with or without a reasonable accommodation.

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[9] Cleveland's Complaint does not allege that her disability began after her termination. (J.A. 5-8). Rather, it was only in response to Defendant's Motion for Summary Judgment that Cleveland first made this contention. (R.I 91).

42 U.S.C. § 12111(8). Because Cleveland and her doctors repeatedly described her as completely disabled, the district court logically and appropriately ruled she could not simultaneously and inconsistently seek the protection of the ADA.

Cleveland appealed the ruling to the Fifth Circuit, which held that the application for, or the receipt of, Social Security benefits creates a rebuttable presumption that the claimant is judicially estopped from asserting she is a "qualified individual with a disability." *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513, 518 (5th Cir. 1997). Affirming the lower court, the Fifth Circuit ruled that, "on the facts before [it]," Cleveland could not rebut her "unambiguous" and "uncontroverted" representations to the SSA and, therefore, was not a "qualified individual with a disability." *See id.* The court observed "[t]o permit Cleveland to make such an argument in the face of her prior, consistent and – until now – uncontested sworn representations to the SSA would be tantamount to condoning her advancement of entirely inconsistent positions, a factual impossibility and a legal contradiction." *See id.*

SUMMARY OF THE ARGUMENT

The application for, or receipt of, Social Security benefits creates a rebuttable presumption that the applicant is judicially estopped from asserting she is a "qualified individual with a disability" within the meaning of the

ADA. This standard is a reasonable, case-specific, common sense approach to determining if a claimant's representations are irreconcilably conflicting. Though stated in the context of "presumption" and "estoppel," the standard is nothing more than the logical application of established legal principles. This standard recognizes and provides a basis for reconciling any differences between the ADA and the Social Security Act. It does not create a per se bar which forever precludes SSA applicants/recipients from seeking the protection of the ADA, but at the same time does not turn a blind eye and deaf ear to sworn representations made to the SSA. Quintessentially fair, it holds individuals to the legal consequences of their words – if you say, as did Cleveland, that you cannot do your job because you were disabled then you cannot later, **absent proper explanation**, come into a court and say you were qualified to do your job.

If this Court does not adopt the Fifth Circuit's standard, an applicant's sworn representations to the SSA are nevertheless relevant to the determination of "qualified individual" status under the ADA and, as here, can be dispositive. Petitioner and the United States acknowledge that prior representations can be material in determining a claimant's ADA status. The parties differ only on the weight to be given to a particular representation, but there can be no doubt that in certain cases summary judgment is appropriate. Based on the consistent, unambiguous representations Cleveland made in order to receive benefits, this case is one of those certain cases for which summary judgment must be granted.

ARGUMENT

I. The Application For, or Receipt Of, Disability Insurance Benefits under the Social Security Act, 42 U.S.C. § 423, Creates a Rebuttable Presumption that the Applicant or Recipient Is Judicially Estopped from Asserting that she is a "Qualified Individual with a Disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

A. The Fifth Circuit's Standard is Fair, Even-handed and Grounded in Common Sense and Established Law.

A rebuttable presumption of judicial estoppel protects the disabled individual and the integrity of the judicial system, while also upholding the purposes of the two statutes. Cleveland, the United States and the various amici have overlooked the flexibility of the standard in their unyielding opposition to the Fifth Circuit's position. They argue that the presumption/estoppel standard is not appropriate because the ADA and the Social Security Act have different meanings for the word "disability."[10] Likewise, they suggest that the Fifth Circuit's standard improperly regards the statutes as alternative methods of recovery, as opposed to complementary ones.[11] These arguments are misplaced. The Fifth Circuit's standard provides a method, in the proper case, for reconciling differences that may exist between the ADA and the

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[10] *See* Petitioner's Brief pp. 27-31; United States, et al. amicus brief pp. 7-18.

[11] *See* Petitioner's Brief p. 24; United States, et al. amicus brief pp. 9-10.

Social Security Act and, thus, allows the statutes to complement one another in the manner Congress intended. Moreover, though the Fifth Circuit uses the words "estoppel" and "presumption," it has not adopted a standard that is different from what courts have been using for years. Rather, the *Cleveland* standard requires a case by case analysis utilizing the existing framework for discrimination cases including, where applicable, established rules for deciding motions for summary judgment. *See Cleveland*, 120 F.3d at 518-19. A comparison of the ADA and Social Security Act underscores the wisdom and flexibility of the Fifth Circuit's approach.

Title I of the ADA extends its protection only to "qualified individual[s] with a disability." *See* 42 U.S.C. § 12112(a). The same standard applies whether disparate treatment or failure to accommodate is alleged. A qualified individual is one who can perform the essential functions of her job with or without a reasonable accommodation. *See* 42 U.S.C. § 12111(8). If an individual's disability precludes her from working, as Cleveland and her doctors repeatedly described her status, she would not qualify for protection.

In comparison, the SSA utilizes a five step sequential process for determining benefits eligibility. First, it determines if the applicant is engaged in substantial gainful activity.[12] Second, it decides whether the applicant has a "severe impairment" that significantly limits her ability

[12] Applicants who are engaged in substantial gainful activity are not considered disabled regardless of their medical condition and, therefore, are not eligible for benefits. *See* 20 C.F.R. § 404.1520(b) (1998).

to perform work. *See* 20 C.F.R. § 404.1520(c) (1998). If the applicant has a severe impairment, the SSA determines whether the applicant satisfies the criteria for a listed impairment.[13] If so, the applicant is considered disabled without further inquiry. *See* 20 C.F.R. § 404.1520(d) (1998). If the applicant's severe impairment is not listed, the SSA determines whether the applicant is prevented from performing "past relevant work." *See* 20 C.F.R. § 404.1520(e) (1998). Finally, the SSA considers whether the applicant can perform work within the national economy based upon her age, education, functional capacity and past work experience. *See* 20 C.F.R. § 404.1520(f) (1998). Throughout the process, the SSA obtains written information from the applicant and her doctors.[14]

The Fifth Circuit's case-specific, rebuttable presumption/estoppel approach allows a court to determine if, in fact, statements to the SSA are inconsistent with, or complementary to, the "qualified individual" requirement of the ADA. For example, if the applicant represented only

[13] The SSA has determined that some conditions, such as amputation of certain limbs, total deafness or blindness, cerebral palsy and Down's Syndrome, are fully disabling and automatically entitle an individual to benefits. *See* 20 C.F.R. § 416.934 (1998).

[14] The disability determination process itself costs approximately $2.5 billion a year. The process relies on no fewer than four levels of administrative review at which different decision makers review claims pursuant to highly structured regulations. The extensive bureaucratic process provides an assurance that claims are rigorously screened. *See* Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans With Disabilities Act and Federal Disability Benefit Programs*, 76 Tex. L. Rev. 1003, 1016-17 (1998).

that she had a presumptive disability, such as blindness, she could still prove in her ADA suit that she was able to work with an accommodation. *See, e.g., Cleveland*, 120 F.3d at 517 (acknowledging that individuals with presumptive disabilities may still be able to work). An individual might also show she was receiving Social Security benefits while engaging in "trial work."[15] *Cleveland*, 120 F.3d at 518 (indicating that an applicant who is engaged in trial work could qualify for ADA protection). In addition, an individual could qualify her representations to the SSA, as did the plaintiff in *Talavera v. School Bd. of Palm Beach Cty.*, 129 F.3d 1214, 1215-16 (11th Cir. 1997), by specifically saying she could work with an accommodation. In each such instance, a plaintiff could rebut or explain why her SSA representations do not negate ADA protection.[16] *Cleveland*, 120 F.3d at 517-19.

The Fifth Circuit's "theoretically conceivable" language has been cited to show that the Court views with skepticism any SSA applicant's ability to prove she is a "qualified individual" under the ADA. *See Talavera*, 129 F.3d at 1219; Petitioner's Brief pp. 15, 23. That language,

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[15] Under its trial work program, the SSA continues to provide benefits to individuals who return to work for nine months. *See* 20 C.F.R. § 404.1592(a) (1998).

[16] This approach also addresses other potential situations raised by the United States in its brief. (*See* United States amicus brief pp. 14-15.) For example, if the receipt of benefits was remote in time, the presumption could be rebutted by changed circumstances because there would be no inconsistency and, therefore, no reason to invoke judicial estoppel.

however, does not narrow the holding or add a theoretically impossible barrier to ADA status. *See id.* In fact, in a footnote to the very sentence which contains this language, the Fifth Circuit cites cases which specifically hold that SSA determinations are not necessarily dispositive in ADA cases. *Cleveland*, 120 F.3d at 517 n.14. Moreover, in the text immediately following the "theoretically conceivable" reference, the Fifth Circuit outlines several specific circumstances where an SSA applicant/recipient could simultaneously be a "qualified individual with a disability" under the ADA. *Id.* at 517-18. These examples even mirror those cited by Cleveland and the United States in their discussions of why the SSA and ADA are complementary statutes, and why representations to the SSA of "disability" are not inconsistent with "qualified individual" status under the ADA. *See id.*; Petitioner's Brief pp. 29-30, 32-33; United States, et al. amicus brief pp. 10-16. The Fifth Circuit also acknowledges, with deference, the interpretive guidance documents and memoranda of the SSA. *Cleveland*, 120 F.3d at 517-18. Therefore, the Fifth Circuit's holding is appropriately broad to allow a fair review of a claimant's possible ADA status.

Overall, when properly applied, the Fifth Circuit's holding allows a Social Security applicant or recipient the opportunity to prove that her representations to the SSA are not inconsistent with the ADA's threshold requirement that she must be a "qualified individual with a disability" in order to seek its protection. Once that burden is met, the plaintiff's case would take the course of a traditional discrimination case. This approach is fair and grounded in common sense. It gives the proper weight to sworn representations, yet allows the ADA claimant the

opportunity to show why the sworn representations do not warrant application of judicial estoppel.

B. The Fifth Circuit's Use of Estoppel, Where Appropriate, as in this Case, Properly Binds Applicants to Their Sworn Representations.

By employing estoppel, the Fifth Circuit's holding appropriately recognizes the fundamental importance of truthful representations. *Cleveland*, 120 F.3d at 518 ("As her statements are unambiguous and previously uncontroverted, she cannot now be heard to complain that she could perform the essential functions of her job during the time between her return to work and her termination."). On the other hand, Cleveland and the various amici have taken an overly technical approach to the propriety of estoppel when a common sense view was intended by the Fifth Circuit. Judicial estoppel rests upon the very simple maxim of a "public policy which exalts the sanctity of the oath. The object is to safeguard the administration of justice by placing a restraint upon the tendency to reckless and false swearing and thereby preserve the public confidence in the purity and efficiency of judicial proceedings." *Melton v. Anderson*, 222 S.W.2d 666, 669 (Tenn. App. 1948). The doctrine is frequently invoked to prevent litigants from playing "fast and loose with the courts," an evil which the courts should not tolerate. *See, e.g., Scarano v. Central R.R.*, 203 F.2d 510, 513 (3d Cir. 1953); *Garcia-Paz v. Swift Textiles, Inc.*, 873 F.Supp. 547, 555-56 (D. Kan. 1995). As one court remarked, it prevents a litigant from "speak[ing] out of both sides of her mouth with equal vigor and credibility before [the] court." *See Reigel v. Kaiser Foundation Health Plan of N.C.*, 859 F.Supp.

963, 970 (E.D.N.C. 1994). In the context of the present case, no one can dispute that an applicant should be honest in her representations about her condition. *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72 (2d Cir. 1997) ("To rule otherwise might leave the implication that someone who feels himself in need of further income is free to misrepresent important information to the Social Security Administration.")

Judicial estoppel is a doctrine based on fundamental fairness. Judicial estoppel applies when: 1) two different positions are taken by the same party; 2) the first position was taken in a judicial or quasi judicial administrative proceeding; 3) the party to be estopped intended for the trier of fact in the first proceeding to accept her position; and 4) the two positions are totally inconsistent.[17] *See Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 601-05 (9th Cir. 1996). This Court long ago recognized that estoppel may be appropriate if a party assumes a certain position in a legal proceeding, succeeds in maintaining that position, and later attempts to assume a contrary position. She may not, thereafter, assume a contrary position simply because her interests have changed, especially if it prejudices the other party. *Davis v. Wakelee*,

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[17] Some courts additionally require that the litigant be successful and obtain some benefit from the first proceeding. *See, e.g., United States v. McCaskey*, 9 F.3d 368, 379 (5th Cir. 1993), *cert. denied, McCaskey v. United States*, 511 U.S. 1042 (1994). In this case, Cleveland received Social Security disability benefits. Therefore, if this additional requirement applies, it has been satisfied. (J.A. 83-84).

156 U.S. 680, 689-91 (1895) (party cannot claim his former assertion false, even if the assertion was a mistake).[18]

An applicant for Social Security disability benefits who thereafter asserts an ADA claim potentially meets each requirement for judicial estoppel. The same individual is seeking both Social Security benefits and ADA damages. The proceeding before the SSA is quasi judicial. The applicant expects the SSA to accept her assertions and award her benefits. Finally, as the Fifth Circuit recognized, the statements are frequently, but not always,

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[18] The *Davis* case does not specify what type of estoppel was applied, but the elements are most similar to those of equitable estoppel.

Likewise, a majority of the Circuits recognize the propriety of judicial estoppel in a variety of circumstances. *See, e.g., United States v. Levasseur*, 846 F.2d 786, 792 (1st Cir.), *cert. denied, Levasseur v. United States*, 488 U.S. 844 (1988); *Bates v. Long Island Ry. Co.*, 997 F.2d 1028, 1038 (2d Cir.), *cert. denied*, 510 U.S. 992 (1993); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 359 (3d Cir. 1996); *Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996) *cert. denied sub nom, Lowery v. Redd*, ___ U.S. ___, 117 S. Ct. 954 (1997); *United States v. McCaskey*, 9 F.3d 368, 379 (5th Cir. 1993) *cert. denied, McCaskey v. United States*, 511 U.S. 1042 (1994); *Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1217-18 (6th Cir. 1990); *Chaveriat v. Williams Pipeline Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993); *Hossaini v. Western Missouri Medical Ctr.*, 140 F.3d 1140, 1143 (8th Cir. 1998); *Johnson v. State of Oregon*, 141 F.3d 1361, 1369 (9th Cir. 1998); *DeShong v. Seaboard Coastline R.R. Co.*, 737 F.2d 1520, 1522 (11th Cir. 1984); *Jackson Jordan, Inc. v. Plasser American Corp.*, 747 F.2d 1567, 1579 (Fed. Cir. 1984).

Two of the Circuit Courts of Appeal do not utilize the doctrine of judicial estoppel under any circumstances. *See Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1330 (10th Cir. 1998); *Swanks v. Washington Metro. Area Transit Auth.*, 116 F.3d 582, 587 (D.C. Cir. 1997).

inconsistent. *Cleveland*, 120 F.3d at 517. If the inconsistency of the applicant's position can be explained and resolved, she can rebut the presumption and judicial estoppel will not prevent her from maintaining her ADA claim. *See id.* at 518. Such an approach is fair, reasonable and promotes the sound policy of judicial economy. Depending on the facts of a particular case, an SSA applicant/recipient who is a "qualified individual" may still pursue her ADA claim, while meritless cases can be resolved by summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. . . . ").

Courts have acknowledged the importance of sworn representations in subsequent civil actions through the use of judicial estoppel. For instance, applying estoppel in an ADEA case and affirming summary judgment for the employer, the Second Circuit observed that

> "the disability program under the Social Security Act is not another unemployment insurance scheme. The integrity of the program depends in large part on the truthfulness of those who apply under it. That is doubtless why they are asked to sign their applications under penalty of perjury, warning them that the consequences of making false statements and requiring them to affirm that the information they have provided is true."

Simon v. Safelite Glass Corp., 128 F.3d 68, 74 (2d Cir. 1997); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 617-18 (3d Cir. 1996) (at the summary judgment stage, plaintiff was judicially estopped from establishing a prima facie case of

discrimination because of his prior unconditional assertions of disability); *Fleck v. K.D.I. Sylvan Pools, Inc.*, 981 F.2d 107, 121 (3d Cir. 1992), *cert. denied*, 507 U.S. 1005 (1993) (plaintiffs' previous representations judicially estop their subsequent claim because "they cannot assert a [present] position . . . inconsistent with the one they previously asserted.").

Similarly, other circuits have granted summary judgment for employers in ADA cases based upon the employee's prior inconsistent representations without specifically using an estoppel analysis. *See, e.g., Weigel v. Target Stores*, 122 F.3d 461, 468-69 (7th Cir. 1997) (summary judgment appropriate because plaintiff could not overcome her "repeated" representations that she was "wholly unable to work" and supporting physician's statement); *Dush v. Appleton Elec. Co.*, 124 F.3d 957, 963-64 (8th Cir. 1997) (affirming summary judgment because plaintiff was unable to establish the strong countervailing evidence necessary to overcome her previous assertions of total disability); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (court affirmed summary judgment because of plaintiff's prior representations of total disability with physician corroboration); *August v. Offices Unlimited, Inc.*, 981 F.2d 576, 584 (1st Cir. 1992) (explaining that plaintiff's previous concession that he was "totally disabled at all relevant times" bars him from "now establish[ing] that he was a qualified, disabled person.").

Courts that have been reluctant to apply judicial estoppel in the SSA/ADA context appear to have read too much into the various legal interpretations of "estoppel," thereby missing the fundamental, common sense

intent of the principle. Specifically, they have suggested that applying estoppel may create a per se rule which always bars an ADA claim following receipt of Social Security benefits. *See, e.g., Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 382 n. 4 (6th Cir. 1998), pet. for cert. filed 66 U.S.L.W. 3800 (Jun. 9, 1998, No. 97-1991); *Blanton v. Inco Alloys Intern.*, 123 F.3d 916, 917 (6th Cir. 1997) (both decisions implying that judicial estoppel creates a per se bar). That concern is misplaced and would, in fact, be contrary to the principles of judicial estoppel.

Under the Fifth Circuit's standard, judicial estoppel bars only an ADA suit when a claimant's representations to the SSA are inconsistent with the "qualified individual" requirement of the ADA, and the inconsistency is not explained or rebutted. *Cleveland*, 120 F.3d at 518-19. *Accord Simon v. Safelite Glass Corp.*, 128 F.3d 68, 73 (2d Cir. 1997) ("If the statements can be reconciled there is no occasion to apply an estoppel."); *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1422-23 (11th Cir. 1998) (Judicial estoppel did not bar ADA claim because assertions were not inconsistent). In Cleveland, the Fifth Circuit emphasized that its ruling was based on the unique facts of the case, and that it was not establishing a per se rule which would automatically find representations of total disability to the SSA as inherently inconsistent with "qualified individual" status under the ADA. *Cleveland*, 120 F.3d at 518-19.

C. As With Estoppel, a Rebuttable Presumption Appropriately Balances the Interests of the Disabled Individual, the Purposes of the ADA and the Social Security Act, and the Sanctity of the Oath.

A rebuttable presumption is consistent with, and works in harmony with, judicial estoppel. It allows a Social Security recipient to overcome the application of judicial estoppel by producing evidence that her positions before the SSA and those in her ADA suit are not inconsistent. *Cleveland*, 120 F.3d at 518-19. A rebuttable presumption is really nothing more than the right to assume something in the absence of an explanation. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-11 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981). For example, the use of a rebuttable presumption was set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) and, subsequently, in *Burdine*, 450 U.S. at 254 and *St. Mary's Honor Center*, 509 U.S. at 507-08, 521. These cases discuss the framework for the allocation of the burden of production in certain types of employment discrimination cases. They show that application of a rebuttable presumption is a longstanding, highly efficient method of determining whether the parties can meet the legal elements of their particular case. *See Burdine*, 450 U.S. at 255 n.8 ("The word 'presumption' properly used refers only to a device for allocating the burden of production. [citations omitted]. . . . Usually, assessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury.").

The Fifth Circuit's rebuttable presumption standard establishes a procedure through which district courts and appellate courts determine whether an ADA plaintiff can satisfy the threshold requirement of being a "qualified individual with a disability." In the present case, the Fifth Circuit applied the presumption in the context of, and in accordance with, summary judgment procedures. When an individual applies for and receives Social Security disability benefits by repeatedly making sworn representations of disability and a resulting inability to work, as did Cleveland, it is appropriate to presume initially that she cannot also simultaneously be a qualified individual with a disability. *See Simon v. Safelite Glass Corp.*, 128 F.3d 68, 74 (2d Cir. 1997) ("[T]he words 'unable to work' are not words of art susceptible of being misunderstood."). Under established legal principles, therefore, summary judgment should be granted in favor of the employer if the claimant cannot, after the opportunity to explain the appearance of an inconsistency, overcome the presumption. *Cleveland*, 123 F.3d at 518-19. This approach is not novel. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("[I]f the factual context renders respondents' claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."). It accords the appropriate weight to an applicant's sworn representations, specifically on the "qualified individual" requirement of the ADA, but permits an opportunity to explain any inconsistency.

The Eighth Circuit applies a similar standard without specifically utilizing a presumption. In *Moore v. Payless Shoe Source*, the court held that " 'prior representations of

total disability carry sufficient weight to grant summary judgment against the [ADA] plaintiff' absent 'strong countervailing evidence that the employee is in fact qualified.' " 139 F.3d 1210, 1213 (8th Cir. 1998), pet. for cert. filed (Jul. 20, 1998, No. 98-5286) (*quoting Dush v. Appleton Elec. Co.*, 124 F.3d 957, 963 (8th Cir. 1997)). Under the Eighth Circuit's approach, the applicant's representations to the SSA are taken as true unless she can overcome, or rebut, those assertions with strong countervailing evidence. *Moore*, 139 F.3d at 1213; *Dush*, 124 F.3d at 963 (observing that, "[w]here, as here, the party opposing the motion has made sworn statements attesting to her total disability and has actually received payments as a result of her condition, the courts should carefully scrutinize the evidence she marshals in an attempt to show she is covered by the ADA. The burden faced by ADA claimants in this position is, by their own making, particularly cumbersome, for summary judgment should issue unless there is 'strong countervailing evidence that the employee . . . is, in fact, qualified.' ")

Thus, like the Fifth Circuit, the Eighth Circuit in effect uses a rebuttable presumption to consider the content and context of the plaintiff's assertions. Doing so allows the plaintiff the opportunity to prove that she is a qualified individual with a disability, but also gives credence to the reasonable and logical meaning of her prior representations. *See id.*; *Cleveland*, 120 F.3d at 518-19. As with the estoppel theory, this approach contemplates and, in fact, provides a method in the appropriate case for addressing the concern that "disabled" means different things under the ADA and the Social Security Act. If, in fact, the plaintiff is entitled to the protection of both

statutes, the standards of the Fifth and Eighth Circuits provide the plaintiff with an opportunity to explain how and why.

As the Fifth Circuit observed, it is inconsistent for an individual to claim that she is disabled and unable to work to obtain Social Security disability benefits, yet able to perform the essential functions of her job. *Cleveland*, 120 F.3d at 516. While Cleveland and her supporting amici acknowledge that the applicant has sworn that she is totally disabled and unable to work, they contend that is not what she meant to say.[19] Specifically, they argue that, because the SSA does not consider "reasonable accommodation," the applicant's sworn representations of total disability are not inconsistent with an ADA claim. That contention is misplaced. It is the applicant's sworn representations, not what the SSA ultimately does with the information, that create the inconsistency.[20] As the Third Circuit observed, "[w]hatever the Social Security Administration's criteria for eligibility for disability benefits, the fact remains that McNemar told the U.S. government . . . under penalty of perjury that he was physically

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[19] Petitioner concedes that the inconsistency "appears obvious when comparing an individual's declaration to the SSA that they are 'disabled and unable to work' with the same individual's claim in an ADA case that they are 'disabled' and 'able to work.' " Petitioner's Brief p. 26.

[20] The EEOC and SSA are each charged with implementing their respective programs. Therefore, if the SSA concludes that it would be too difficult to consider reasonable accommodation in its disability determination, the court should defer to that decision. It is, however, the court's responsibility to protect the integrity of the judicial system and determine what effect sworn prior representations have on an ADA lawsuit.

unable to work. . . . " *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 620 (3d Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 958 (1997). Through the Fifth Circuit's flexible standard, however, the ADA claimant is not automatically barred from being a "qualified individual" despite her inconsistent positions. She is allowed the opportunity to explain the inconsistency. If there is no explanation, or an inadequate one, the claimant should not be allowed to maintain her ADA claim.

D. The Clear Statutory Language Must Control the ADA's Application in the Absence of Specific Legislative Intent.

Much has been surmised about legislative intent.[21] While Petitioner and her supporting amici repeatedly tout the broad sweeping goals of the ADA, they ignore the actual wording of the statute. *See Dush*, 124 F.3d at 961 ("When interpreting remedial statutes . . . it is invariably necessary to temper generalized recitations of legislative purpose with the precise language used to define a law's parameters."); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) ("[T]he starting point in every case involving construction of a statute is the language itself."). What is clear from the plain language of the ADA is that it does not apply to every disabled person. *See* 42 U.S.C § 12111(8). It simply was not intended to cover disabled

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[21] *See, e.g.*, Petitioner's Brief pp. 22-25; United States, et al. amicus brief p. 15. The fact is that the Social Security Act was scarcely mentioned when the ADA was being considered and finally adopted. Diller, *supra* note 14 at 1031 ("The interaction between the ADA and the disability benefit programs was barely addressed at the time the ADA was enacted.").

individuals who cannot work. *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 618 (3d Cir. 1996), *cert. denied*. ___ U.S. ___, 117 S. Ct. 958 (1997) ("A person unable to work is not intended to be, and is not, covered by the ADA."). Rather, the statute applies only to those individuals who have a qualifying disability and who can perform the essential functions of their jobs with or without reasonable accommodation. *See* 42 U.S.C. §§ 12102(2), 12111(8). A plaintiff must, therefore, prove as a part of her prima facie case that she is within the class of individuals to be protected.

No one disputes that the ADA is a worthy statute designed to eliminate discrimination against the disabled. "Nevertheless, a court of law must venture beyond such sweeping abstractions and ask various questions which, without a doubt, will fail to produce the sort of emotional thunder often engendered by broadly worded statements of remedial intent, but which are indispensable to a meaningful application of the statute." *Dush*, 124 F.3d at 961. The relevant statutory inquiry in this case, therefore, is who are the intended beneficiaries of the ADA. *Id.* "As is usually so, Congress has provided the answer in the language of the statute itself: The ADA was designed to prevent an employer from discriminating against 'a qualified individual with a disability . . . who, with or without reasonable accommodation, can perform the essential functions of the employment position'. . . . " *Id. quoting* 42 U.S.C. §§ 12111(8), 12112(a). Clearly, only some (and not all), disabled individuals are entitled to ADA protection.

Despite the language of the statute, the D.C. Circuit proclaims Congress did not intend for disabled persons to choose between Social Security disability benefits and the ADA. *See Swanks v. Washington Metro. Area Transit*

Auth., 116 F.3d 582, 586 (D.C. Cir. 1997). Cleveland and the United States make the same argument. Petitioner's Brief p. 24; United States amicus brief p. 15. Although their rationale for this result is "legislative intent," Congress was actually silent on this point. *McNemar*, 91 F.3d at 619 (approving the lower court's explanation that "[t]here is no indication that either the United States Congress . . . intended to provide disability benefits to persons capable of obtaining gainful employment, and it is the province of the legislature rather than this court to authorize such a double recovery."). If Congress did not mean what it said – that to be a qualified individual with a disability requires the individual to be able to perform the essential functions of her job with or without a reasonable accommodation – then Congress, not the courts, should revise the ADA, the Social Security Act or both.[22]

The courts and commentators[23] speculating about legislative intent are also concerned about the establishment of a standard by which an individual who is disabled under the Social Security framework, but who is also able to perform the essential functions of her job, is

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[22] 142 Cong. Rec. 58472 (daily ed. July 22, 1996) (statement by Senator Jeffords) (stating that the ADA and the disability benefit programs make up a "schizophrenic national disability policy" because of a lack of an integration with the Social Security Disability Insurance and SSI programs).

[23] *See, e.g., Swanks*, 116 F.3d at 584-86; Diller, *supra* note 14 at 1017-19.

required to elect between pursuing social security benefits and ADA benefits. The Fifth Circuit's approach addresses this concern. In fact, *Cleveland* specifically acknowledged a number of situations similar to those described by Petitioner and the United States, where a Social Security applicant/recipient would also be a qualified individual with a disability. In those situations, applying the Fifth Circuit's flexible rebuttable presumption analysis, the applicant/recipient can still show that judicial estoppel and, consequently, summary judgment is not appropriate. There is no implicit requirement in *Cleveland* that an individual must choose either the Social Security Act or the ADA and may not pursue both. By using a presumption/estoppel analysis, which in turn requires the court to review the surrounding facts and circumstances of each case, the individual's rights, as well as the integrity of the statutes and the judicial process, are protected.[24]

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[24] The present facts are not analogous to those in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). Under the ADA, a person who is not qualified to perform the essential functions of her job is not protected from discrimination. If a person is not in a protected class, there is no unlawful discrimination and no liability. Thus, the relevant question is whether the applicant can establish a prima facie case of discrimination. If she cannot, the employer has no obligation to articulate legitimate business reasons for its decision. *See McNemar*, 91 F.3d at 620-21.

II. If the Application for, or Receipt of, Disability Benefits Does Not Create a Rebuttable Presumption of Judicial Estoppel, the Representations an Applicant Makes to the Social Security Administration are Nonetheless Material, Relevant and Often Dispositive of Whether She is Simultaneously a "Qualified Individual with a Disability."

If the application for, or receipt of, Social Security disability benefits does not create a rebuttable presumption of judicial estoppel, an applicant's representations to the SSA are fully admissible and, as here, can be dispositive of whether the Social Security applicant is a "qualified individual" under the ADA.[25] This standard is essentially the same as that advocated by Cleveland and the United States. Petitioner's Brief p. 19; United States, et al. amicus brief p. 6. In this case, the clear, consistent, uncontroverted representations of Cleveland and her doctors demonstrate that summary judgment was appropriate.

Only three positions are possible regarding the effect of the application for, or receipt of, Social Security benefits on a claimant's ability to assert that she is a "qualified individual with a disability" under the ADA. SSA applicants/recipients 1) will always be barred or 2) will never be barred or 3) may sometimes be barred. Respondent does not advocate a per se bar. At the same time, none of the parties, amici, or circuit courts that have addressed the issue, including the Fifth Circuit, contend there can **never** be a bar. *See Cleveland*, 120 F.3d at 517; Petitioner's

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[25] *See, e.g., Moore v. Payless Shoe Source, Inc.*, 139 F.3d 1210 (8th Cir. 1998), pet. for cert. filed (Jul. 20, 1998, No. 98-5286).

Brief p. 19; United States, et al. amicus brief p. 6. Therefore, the issue before this Court is not whether to adopt one extreme or the other, but rather under what circumstances a bar exists, as a matter of law, to claiming ADA "qualified individual" status despite SSA representations.

Indeed, as the United States, et al. acknowledge, "[i]n certain cases . . . an applicant for disability benefits may make specific factual statements concerning her functional capacities. In some of those cases, there may be an inconsistency between those factual statements and her later statements in support of an ADA claim. In that case, the prior statements to the SSA may be relevant to the qualification issue in the ADA action and may lead to a determination that relief under the ADA is not available or should be limited." United States, et al. amicus brief p. 6.

Whether a court applies a rebuttable presumption approach or simply analyzes the facts under a traditional summary judgment standard, the result will be the same as that advanced by both Respondent and the United States. In the appropriate case, such as *Cleveland*, the SSA representations will be sufficiently unambiguous and uncontroverted to preclude the claimant from being a "qualified individual with a disability" under the ADA. In other cases, the SSA representations are, at a minimum, evidence to be considered by the trier of fact. Cleveland's prior statements, made not once, not twice, but repeatedly and in her own words, and corroborated by her doctors, confirm, as a matter of law, that relief under the ADA is not available to Cleveland and that summary judgment was appropriate.

This position is not at all controversial. In fact, the relevance of SSA representations, and the potentially dispositive nature thereof, has been acknowledged by Petitioner and the United States as being appropriate in "certain cases." *See* Petitioner's brief p. 19; United States et al. amicus brief p. 6. Moreover, it is consistent with the view of every circuit that has considered the issue.[26] As noted previously, courts uniformly hold that the representations a claimant makes in order to receive disability benefits are relevant, material evidence in determining whether the claimant can establish a prima facie case under the ADA. *See Moore v. Payless Shoe Source, Inc.* 139 F.3d 1210, 1213 (8th Cir. 1998), pet. for cert. filed (Jul. 20, 1998, No. 98-5286) ("[P]rior representations of total disability carry sufficient weight to grant summary judgment against the [ADA] plaintiff absent strong countervailing evidence that the employee is in fact qualified."); *August v. Offices Unlimited, Inc.*, 981 F.2d 576, 579-81 (1st Cir. 1992) (Without specifically using judicial

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[26] *See, e.g., August v. Offices Unlimited, Inc.*, 981 F.2d 576, 581 (1st Cir. 1992); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 620 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997); *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513, 518 (5th Cir. 1997); *Griffith v. Wal-Mart Stores*, 135 F.3d 376, 383 (6th Cir. 1998); *Weigel v. Target Stores*, 122 F.3d 461, 467-68 (7th Cir. 1997); *Dush v. Appleton Electric Co.*, 124 F.3d 957, 963 (8th Cir. 1997); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1332 (10th Cir. 1998); *Talavera v. School Bd. of Palm Beach Cty.*, 129 F.3d 1214, 1220 (11th Cir. 1997); *Swanks v. Washington Metropolitan Transit Authority*, 116 F.3d 582, 587 (D.C. Cir. 1997); *see also Simon v. Safelite Glass Corp.*, 128 F.3d 68 (2d Cir. 1997) (acknowledging the importance of a claimant's representations to the SSA in an ADEA claim).

estoppel, the court upheld summary judgment because the claimant stated he was disabled and unable to work before he requested accommodation.).

Similar to the other cases Petitioner and the United States cite with approval, *Swanks v. Washington Metropolitan Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997), acknowledges that statements supporting disability claims are relevant in ADA suits. Summary judgment in that case was not affirmed because of a lack of evidence:

> The conclusion we reach today does not mean that claimants' statements in support of disability claims are never relevant in ADA suits. . . . Here, however, the record contains no evidence of Swanks' position before the Social Security Administration; we know nothing about what he said in his application for Social Security disability benefits, what evidence he provided to support his claim, or what statements he or any of his witnesses made in the course of the proceedings.

Id. at 587.

Since the *Swanks* court did not have enough facts to determine the existence of inconsistent statements, let alone the nature of any such statements, it could not reasonably and responsibly uphold summary judgment. *Swanks* also cited with approval *Pyramid Securities, Ltd. v. IB. Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir.), *cert. denied*, 502 U.S. 822 (1991), which held "that parties' prior sworn statements must be given 'controlling weight' at summary judgment unless 'the shifting party can offer

persuasive reasons for believing the supposed correction.' " *See Swanks,* 116 F.3d at 587. Thus, under the D.C. Circuit's analysis, Cleveland's sworn representations would be given "controlling weight" and she would be required to offer persuasive proof that what she told the SSA was not mutually exclusive, and legally fatal, to her ADA claim.

The facts bear stating one last time. Cleveland repeatedly and unambiguously represented to the SSA that she became "unable to work on January 7, 1994," and that she was "disabled." (J.A. 20-24). She said: "I had a stroke in January 1994; I went back to work but I couldn't work." (J.A. 57). She said on at least four occasions that she could not do her job **because of** her disability. (J.A. 47, 57, 73-74, 79). Her medical providers stated she was "100% disabled" and "permanently and completely disabled from any productive work." (J.A. 45, 71-72). Cleveland made consistent, unambiguous representations under penalty of perjury that she was disabled and unable to work beginning January 7, 1994. (J.A. 20-24, 47, 57); *Cleveland,* 120 F.3d at 518. She never told the SSA her disability began, or grew worse, after her termination from PMSC. (J.A. 20-24, 47, 57). As a result, an administrative law judge found Cleveland became disabled beginning January 7, 1994 and awarded Social Security disability benefits retroactive to that date. (J.A. 83-84); *Cleveland,* 120 F.3d at 515.

These were Cleveland's own words, or the words of her doctors, that she provided to the SSA to get benefits. Contrary to the contentions of the Petitioner and the United States, et al., she did not simply check boxes on computerized forms or use the SSA's mandatory catch

phrases. These individual specific representations mandated summary judgment under a traditional factual analysis and the application of existing law. *Cleveland* is one of those "certain cases" that should "lead to a determination that relief under the ADA is not available. . . . " United States, et al amicus brief p. 6. Accordingly, summary judgment was appropriate and the Fifth Circuit's ruling should be affirmed.

CONCLUSION

As the Fifth Circuit held, Cleveland's representations to the SSA created a rebuttable presumption that she was judicially estopped from claiming she was a "qualified individual with a disability." Cleveland failed to overcome that presumption with her summary judgment proof. Alternatively, under a traditional summary judgment analysis, Cleveland's prior representations provide the evidence which, given the absence of an adequate explanation in the form of competent, contraverting evidence, shows as a matter of law that Cleveland cannot establish a prima facie case under the ADA. Under either

rationale, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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